

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JOSE L. RODRIGUEZ** : DETERMINATION  
DTA NO. 829871  
for Revision of a Determination or for Refund of New York:  
State Sales and Use Taxes Under Articles 28 and 29 of the  
Tax Law for the Period February 29, 2016 through :  
February 28, 2018. :  
\_\_\_\_\_:

Petitioner, Jose L. Rodriguez, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period February 29, 2016 through February 28, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), brought a motion dated November 22, 2022, seeking an order granting summary determination in its favor pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Altman Schochet, LLP (Irena Shternfeld, Esq., and Aaron L. Altman, Esq. of counsel), did not respond to the Division of Taxation's motion. The 90-day period for issuance of this determination commenced on December 22, 2022. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination for the period February 29, 2016 through February 28, 2018.

***FINDINGS OF FACT***

1. The subject of the Division of Taxation's (Division) motion is the timeliness of petitioner's protest of a notice of determination, dated February 19, 2019, and bearing assessment identification number L-049489330 (notice). The notice is addressed to petitioner, Jose L. Rodriguez, at an address in Staten Island, New York. The notice asserts that petitioner is being assessed as an officer/responsible person of Cala D'Or Group, LLC, for the period February 29, 2016 through February 28, 2018.

2. On February 19, 2020, petitioner filed a petition with the Division of Tax Appeals in protest of the notice.

3. On August 3, 2020, the Division of Tax Appeals issued a notice of intent to dismiss petition (notice of intent) to petitioner, based on an issue of timeliness of the filing of the petition.

4. On April 14, 2021, Supervision Administrative Law Judge Herbert M. Friedman, Jr., sent correspondence to the parties rescinding the notice of intent on the basis that "Section 1138 of the Tax Law provides that a responsible party's petition is timely if the corporate assessment petition is timely filed. The associated petition is DTA number 829387. Consequently, the Notice of Intent to Dismiss Petition issued on August 3, 2020 is rescinded."

5. On October 28, 2021, the Division of Tax Appeals issued a determination for DTA number 829387, determining that Cala D'Or Group, LLC, failed to file a timely petition with the Division of Tax Appeals or request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) within 90 days from the date of the notice of determination issued to it for the period September 1, 2015 through February 28, 2018 (***Matter of Cala D'Or Group, LLC***, Division of Tax Appeals, October 28, 2021).

6. In support of its motion for summary determination in this matter and to show proper mailing of the notice, the Division provided, along with an affirmation of Adam Roberts, Esq., the following with its motion papers: (i) an affidavit, dated September 21, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail – Assessments Receivable" (CMR) postmarked February 19, 2019; (iii) an affidavit, dated September 28, 2020, of Susan Saccocio, a manager in the Division's mailroom; (iv) a copy of the notice mailed to petitioner with the associated mailing cover sheet; (v) an affidavit, dated September 28, 2020, of Heidi Corina, Legal Assistant 2 in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (vi) a Postal Service Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated September 14, 2020; and (vii) copy of petitioner's e-filed resident income tax return for the year 2017, filed on April 2, 2018, that reflects the same Staten Island, New York, address that is set forth on the notice and the petition. This was the last return filed by petitioner before the notice was issued.

7. The affidavit of Deena Picard, who has been in her current position since February 2006 and Acting Director since May 2017, sets forth the Division's general procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice,

this date was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of “2/19.” In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page.

8. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled “Certified No.” The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading “Reference No.” The names and addresses of the recipients are listed under “Name of Addressee, Street, and PO Address.”

9. The CMR in the present matter consists of 15 pages and lists 155 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries, with the exception of page 15, which contains 1 entry. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark, dated February 19, 2019, to each page of the CMR, wrote the number “155” on page 15 next to the heading “Total Pieces Received at Post Office,” and initialed or signed page 15.

10. Page 2 of the CMR indicates that a notice was mailed to petitioner at his Staten Island,

New York, address with certified control number 7104 1002 9730 0347 2954 and reference number L 049489330. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears the certified control number for the notice and petitioner's name and address as noted.

11. The affidavit of Susan Saccocio, a manager in the Division's mailroom, describes the mailroom's general operations and procedures. Ms. Saccocio has been in this position since 2017 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces of mail listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mailroom further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. Each page of the CMR in exhibit "A" of the Picard affidavit contains a USPS postmark of February 19, 2019. On page 15, corresponding to "Total Pieces and Amounts," is the preprinted number 155 and next to "Total Pieces Received At Post Office" is the handwritten entry "155." There is a set of initials or signature on page 15. According to the Picard and Saccocio affidavits, a copy of the notice was mailed to petitioner on

February 19, 2019, as claimed.

12. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the subject notice. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 0347 2954. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 0347 2954 and addressed to petitioner was delivered as addressed on February 22, 2019. Attached to the Corina affidavit as exhibit "A" is the Division's "Request For Delivery Information" for article number 7104 1002 9730 0347 2954. Exhibit "B" to the Corina affidavit is the USPS response to the Division's request indicating delivery of the same article on February 22, 2019 to the Staten Island, New York, address listed on the notice.

13. Petitioner did not respond to the motion.

### ***CONCLUSIONS OF LAW***

A. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (*see* Tax Law § 2006 [4]; 20 NYCRR 3000.3 [c]). Pursuant to Tax Law § 1138 (a) (1), the notice in this case would be binding upon petitioner unless he or the related corporation entity for which he was deemed a responsible person filed a timely petition with the Division of Tax Appeals. Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the BCMS "if the time to petition for such a hearing has not elapsed" (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals

Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukas*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedure was followed in this particular instance.

C. The Division has established the existence of a standard mailing procedure through the affidavits of Ms. Picard and Ms. Saccocio, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the relevant period. Moreover, the CMR in the present matter has been properly completed and, thus, constitutes highly probative evidence of both date and fact of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Therefore, the Division has met its burden to show that a copy of the notice at issue was mailed, as addressed, to petitioner on February 19, 2019.

D. Since the Division has demonstrated proper mailing of the notice, such a showing gives rise to a presumption of receipt of the notice by the person to whom it was addressed (*see* Tax Law § 1147 [a] [1]). In this matter, petitioner did not respond to the Division's motion and, therefore, is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals*, 99 AD2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Therefore, petitioner has failed to rebut the presumption of receipt of the notice.

E. As set forth above, a taxpayer may protest a notice by filing a petition with the Division of Tax Appeals, or by filing a request for conciliation conference with BCMS, within 90 days from the date of mailing the notice (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a] [a]). In this case, petitioner filed its petition with the Division of Tax Appeals on February 19, 2020, a date that falls more than 90 days from the mailing date of the notice. Therefore, the petition was not timely filed. Moreover, it was ultimately determined that the related corporate entity, for which petitioner was assessed as a responsible person, did not file a timely petition with the Division of Tax Appeals or a request for conciliation conference with BCMS within 90 days from the date of the notice of determination issued to it for the period September 1, 2015 through February 28, 2018 (*Matter of Cala D'Or Group, LLC*).<sup>1</sup> As such, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs; Matter of Sak Smoke Shop*).

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<sup>1</sup> Official notice of the record of proceedings in *Matter of Cala D'Or Group, LLC*. (Division of Tax Appeals, October 28, 2021) is taken pursuant to State Administrative Procedure Act (SAPA) § 306 (4). Pursuant to SAPA § 306 (4) official notice can be taken of all facts of which judicial notice could be taken. Since a court may take judicial notice of its own records (*Matter of Ordway*, 196 NY 95 [1909]), the Division of Tax Appeals may take official notice of its record of proceedings (*see Bracken v Axelrod*, 93 AD2d 913 [3d Dept 1983]).

F. The Division of Taxation's motion for summary determination is granted and the petition of Jose L. Rodriguez is dismissed.

DATED: Albany, New York  
March 16, 2023

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE